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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SCHOOLCRAFT,

5 Plaintiff,

6 v.

10 CV 6005

7 THE CITY OF NEW YORK,
8 Defendant.

9 -----x

New York, N.Y.
April 4, 2012
12:36 p.m.

10 Before:

11 HON. ROBERT W. SWEET,

District Judge

12 APPEARANCES

13 JON L. NORINSBERG
14 Attorney for Plaintiff

15 COHEN & FITCH
16 Attorneys for Plaintiff
BY: JOSHUA P. FITCH
GERALD M. COHEN

17 SPECIAL FEDERAL LITIGATION DIVISION
18 Attorney for Defendant
BY: SUZANNA H. PUBLICKER
RACHEL SELIGMAN WEISS

19 MARTIN CLEARWATER & BELL, LLP
20 Attorneys for Defendant
BY: GREGORY J. RADOMISLI

21 IVONE, DEVINE & JENSEN
22 Attorneys for Defendant
BY: BRIAN E. LEE

23 CALLAN, KOSTER, BRADY & BRENNAN, LLP
24 Attorneys for Defendant
BY: MATTHEW J. KOSTER

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(In open court)

THE COURT: I'll hear you.

MR. NORINSBERG: The City seeks to have cart blanche to have discovery sealed here, despite --

THE COURT: Well, that's not quite right. The stipulation is not cart blanche, it is relatively precise, it seems to me.

MR. NORINSBERG: Your Honor, under one provision of the confidentiality order, paragraph 1L --

THE COURT: Yeah.

MR. NORINSBERG: -- says: Any document identified by the City is subject to this order.

Which I read to mean that they can designate any document they wish.

THE COURT: Well, yeah, when they define the confidential documents, they are kind of precise, it seems to me. Right? Or wrong.

Can it be that they could designate something, yeah, sure, I guess that's right. I take it that both sides would have to agree, but I don't -- I'm not sure about that.

MR. NORINSBERG: And that, your Honor, I think is the great flaw in the order, is that there is no mechanism for allowing that challenge to be made and good cause to be shown. That law requires good cause. But if you look at this stipulation, there is no mechanism for challenging. And what

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1 I'm really asking for here is that the City do what it did in
2 Schiller. And it knows the law from Schiller, we were all in
3 that case together. And in Schiller, there was a defined
4 mechanism where plaintiffs could raise, if there was an
5 improper designation, and come to the Court if the parties
6 couldn't agree. At that point interveners, if they felt so
7 moved, could also play a role.

8 But very clearly, under the Schiller-type
9 confidentiality order, which I think is fairly standard, there
10 is a mechanism for raising whether there has been over
11 designation. Nothing in this order allows that.

12 THE COURT: Anything else?

13 MR. NORINSBERG: I'd also like to speak to the City's
14 point in its letter, which we have not addressed, which is that
15 modification is disfavored. And it cites the rule that
16 protective orders cannot be modified except for extraordinary
17 circumstances.

18 They slightly misstate that in that if you look at the
19 cases that are relied upon here, primarily the street.com case,
20 that in that case the Second Circuit says: Some protective
21 orders may not merit strong presumption against modification.

22 Then you go back to Agent Orange, the case that
23 ultimately is, I think, probably the seminal case in this. And
24 it speaks directly to this kind of order. What the Second
25 Circuit says in Agent Orange is that under the order, there,

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1 appellants needed only to designate discovery materials
2 confidential to protect them. We conclude that the
3 exceptionally pervasive protection granted appellants, coupled
4 with the fact that the appellants never were required to show
5 good cause, mandated by 26C, amounts to the type of
6 extraordinary circumstances contemplated by required decisions.
7 But, simply, when you have an order like this one, which allows
8 broad sealing, doesn't require good cause, that is precisely
9 the kind of extraordinary circumstance that was contemplated by
10 the Second Circuit as allowing modification.

11 What we ask for here is really that the City, the
12 other defendants, be held to that standard of 26C and that
13 there be a mechanism if they do not meet that standard, if they
14 do not show good cause, that that can be brought back before
15 the Court for a resolution. So it's a very important case, the
16 case about a coverup, the --

17 THE COURT: I'm familiar with it.

18 MR. NORINSBERG: I understand, your Honor.

19 And the last point I would make, your Honor, is that
20 there is meaning to that 26C good cause requirement.

21 The cases we cite show that in these cases where there
22 is a public defendant, define specific and serious injury makes
23 up the heart of good cause for sealing.

24 Thank you, your Honor.

25 THE COURT: Thanks.

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1 Yes.

2 MS. PUBLICKER: Your Honor, if I could just start by
3 addressing the statements about the Agent Orange case.

4 To begin with, the Agent Orange case is from 1987.
5 And that preceded the change in former Rule 5D. So prior to
6 that time, all discovery materials were filed in Court,
7 bringing them into the category of judicial records to which
8 the public would have access. And as I understand it,
9 therefore, the modification of Rule 5D did significantly change
10 the holdings of Agent Orange based on the fact that documents
11 prior to the 5D were presumptively judicial documents that were
12 open to the public.

13 Again, as your Honor pointed out, I'll move on to the
14 confidentiality stip itself. It does explicitly mention
15 certain classes of documents. The vast majority of discovery
16 in this case fits into those specific categories of documents
17 previously produced.

18 THE COURT: Yes. But they do -- I must say, I hadn't
19 focused on it as closely as I should have, obviously. But F,
20 1F, does sort of look cart blanche, doesn't it?

21 MS. PUBLICKER: Yes, your Honor. It does say that
22 documents identified by the City could be made subject to this
23 order.

24 And I understand that the argument is that there is no
25 additional provision in the stipulation as there have been in

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1 Schiller for a challenge mechanism. But it's the City's
2 position that there is nothing stopping plaintiffs, had they a
3 challenge to one of the documents we had produced as
4 confidential, bringing that to the attention of the Court for
5 adjudication.

6 THE COURT: Well, in other words, you would have no
7 objection if I were to say that the parties -- and how about,
8 of course, the parties, that's one thing. You wouldn't have
9 any objection to that, of course. I mean I'm assuming you
10 wouldn't from what you have just said. But we have this new
11 party, this new, noisy party, that has just joined the fray.
12 And I take it you would not want -- there couldn't really be
13 any designation for getting them in on good cause, as I see it,
14 without giving them the document.

15 So I don't know how we solve that problem.

16 MS. PUBLICKER: Your Honor, one idea that we have
17 considered is we would be willing to produce a broad general
18 list of the records that we have produced, stating the category
19 of documents they are. And, again, if there is a specific
20 document within there that The Times believes is
21 inappropriately designated as confidential, we can address that
22 specifically. But at this time, you know, their letter, as we
23 have pointed out in our response, doesn't list a single
24 document that they believe has been inappropriately labeled as
25 confidential.

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1 THE COURT: Of course the reason for that is obvious,
2 because they don't know the documents.

3 MS. PUBLICKER: However --

4 THE COURT: Except of course we all know the elephant
5 in the corner of the room.

6 MS. PUBLICKER: And as we -- as plaintiff stated at
7 the last conference, they were not challenging the designation
8 as confidential as those records.

9 THE COURT: Yeah. Anything else you want to tell me?

10 MS. PUBLICKER: Again, I would just state that the
11 burden, as there is a confidentiality order in place in this
12 matter that does explicitly list documents such as the one
13 underneath the elephant in the corner, that it's their burden
14 to demonstrate, you know, why they have a compelling need or
15 why the order was improvidently granted.

16 THE COURT: Anything from the defense? Okay.

17 What would you all --

18 MR. KOSTER: No.

19 THE COURT: -- what would you all -- obviously, the
20 parties entered into this stipulation for their own purposes,
21 and the enumeration of the documents covered make it evident
22 why at least that enumeration was set forth.

23 The Times does raise this issue about leaving aside
24 the discovery aspect of it, as opposed to some other phase of
25 litigation. Leaving that aside for the moment. A procedure

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1 has been talked about here that could solve the problem of good
2 cause, it seems to me. And what's crossing my mind is to,
3 based on the discussion today, ask the parties to consider
4 revising the stipulation to include a good cause provision.
5 And I understand the City's view is that the defense could have
6 challenged anything. And I think that's probably right, that
7 they could have. And I would -- I would have heard it, I
8 think. But that could be made explicit. And we could also say
9 because there is an element of public interest, perhaps a
10 categorization of documents should be made.

11 How would the parties to the litigation feel about
12 such a proposal.

13 MR. FITCH: We would obviously consent, your Honor.
14 There is a little bit of a, I guess, a sticky issue now,
15 because last week we had agreed to enter into an attorney's
16 eyes only stipulation to alleviate defendant's concerns.

17 THE COURT: That would stick.

18 MR. FITCH: That was the only thought that crossed my
19 mind was exactly how that would interplay with a revised
20 confidentiality order.

21 THE COURT: I don't see that it would create a
22 problem.

23 MR. FITCH: Okay. Obviously we would consent.

24 THE COURT: How about the City.

25 MS. PUBLICKER: Your Honor, we would consent as well.

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1 THE COURT: All right. Well, then, may I suggest that
2 the parties see if you can work out an amendment to the
3 stipulation. And be kind enough to share it with the New
4 York -- oh, by the way. I think it's appropriate to grant the
5 motion of The New York Times to intervene. I'll grant that for
6 the purpose of raising these issues. And I think it would be,
7 under the circumstances, an appropriate courtesy to give them a
8 copy of whatever it is that you all work out.

9 So since everybody seems to think that is a good idea,
10 and I didn't have anything to do with it, the motion of The
11 Times is granted in part, and denied in part. Granted as to
12 intervention, denied as to the rest.

13 And then we'll see how things work out, okay?

14 MS. PUBLICKER: Thank you, your Honor.

15 THE COURT: Thank you, all.

16 (Adjourned)

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